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NSC review completed.

File

28 February 1983

MEMORANDUM FOR: Chairman, NIC
NIO for Economics

FROM : 25X1
Deputy Chief
Technology Transfer Assessment Center

SUBJECT : Export Administration Act (EAA)
Renewal: Options Paper 25X1

1. Lionel Olmer chaired an interagency meeting this morning from 0730 to 0930 and resolved as many of the remaining issues in the attached options paper as possible. He will brief the SIG-IEP this afternoon on the remaining issues that he believes deserving Cabinet level decision. Lionel and Richard Pearle consulted over the weekend and reached an understanding between Commerce and Defense on the approach to some of the issues. 25X1

2. The principal issues that will be escalated to the Cabinet level at today's SIG-IEP are as follows:

A. Imposition of Sanctions:

Issue 3 p.4: Should the EAA provide sanctions against COCOM members who violate COCOM agreements? (DoD)

Issue F 1 on p.17: Should import controls be imposed on a country whenever export controls are imposed on that country, subject to such exceptions as the President may prescribe? (Heinz)

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The sense of the group is that sanctions should be made company specific and not country specific. This will strengthen the President's hand by allowing foreign firms to be placed on a denial list and risk losing their sales in the US market, a much larger market by far, than loss of sales to the Soviet Bloc. Current practice allows only for US firms to be placed on an export denial list.

B. Energy Dependence

p. 9 Issue 3: Should a finding and policy declaration be proposed asserting that export controls should be used to seek to prevent the U.S. and its allies from exclusive energy and other critical resource dependence on potential adversaries? (ACEP)

There are really two issues involved, the broader policy question as to whether this should be a U.S. foreign policy objective, and second; whether the EAA should be used to effectuate such a policy?

C. Sanctity of Contracts, Compensations, and Insurance

p.12 B Issue 1: Should contracts and export licenses be protected from later imposition of controls for at least a specified period of time?

This issue will probably be discussed along with the question of compensation and insurance (OPIC). At present Agriculture enjoys a 270 day delay from the date of imposition of controls plus full compensation for export losses. The U.S. business community does not enjoy these exceptions.

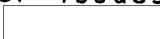
D. Customs Role:

p.21 B Issue 1: Should all enforcement functions be transferred to Customs? (Nunn and Heinz)

State and Treasury went on record as approving this move. Lionel Olmer was surprised at State's action. It was unclear whether Secretary Shultz had made this commitment. From my recent two week trip to Europe with the U.S. bilateral team on export control enforcement, it is clear that enforcement overseas, to be effective, will have to be a shared responsibility among U.S. Customs, Commerce's Foreign Commercial Service, and State's economic officers. Although Customs is a key player, it does not enjoy a monopoly in working

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with other foreign non-Customs services
investigatory bodies responsible for export control
investigations and prosecutions.

3. Outcome of the other issues are noted in the margin of
the attached options paper. 

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Attachment:
As stated

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28 Feb 1983

EXPORT ADMINISTRATION ACT RENEWALOPTIONS PAPERI. National Security ControlsA. Foreign Availability (Section 5(f))

Issue 1: Should foreign availability be eliminated as a criterion for decontrol of items on the Commodity Control List (CCL)? (ACEP).

Present Law: When the Secretary of Commerce determines that goods and technology controlled for national security purposes are available from foreign sources, he must decontrol the items and issue an export license, unless the President decides that removing controls would be detrimental to the national security.

Pro: Foreign availability is often difficult to determine accurately. Therefore, in the national security area, this should not be a criterion for decontrol. Even if foreign availability could be accurately determined, national security concerns should still preclude decontrol of these items.

Con: For the United States to control items available from foreign sources would be ineffective and unnecessarily harmful to U.S. businesses. Moreover, there is no need to eliminate foreign availability as a criterion for decontrol, because the Presidential override can be invoked as necessary to maintain export controls on a given item.

Approve _____ Disapprove ✓

Issue 2: Should the current mandatory license approval standard on the basis of foreign availability be changed to a discretionary standard for up to one year while negotiating to eliminate the foreign availability? (The provision for override for national security reasons would remain unchanged; the mandatory

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approval standard would apply after the one year period.) (ACEP)

Present Law: Barring a Presidential override for national security reasons, the Secretary must approve a license when foreign availability is found to exist.

Pro: As a practical matter, the override provision already gives the Secretary of Commerce discretion to deny a license despite foreign availability. This proposal emphasizes the need to negotiate with our allies and other nations to remove the availability of items and technology to the Warsaw Pact from foreign sources. Moreover, withholding of licenses may strengthen the U.S. negotiating posture.

Con: For the United States to deny licenses on items available from foreign sources would be ineffective and unnecessarily harmful to U.S. businesses. Withholding of licenses may in fact weaken the U.S. negotiating posture. Delay of license issuance for one year may be tantamount in many cases to a denial.

Approve _____

Disapprove _____ ✓

Issue 3. Should the current definition of foreign availability be made more specific as follows: "For purposes of this Act, assessment of comparable quantity and quality shall include, but not be limited to, the following factors: cost, reliability, the availability and reliability of spare parts, and cost of quality thereof, maintenance programs, technological data packages, back-up packages, long-term durability scale of production, ease with which machinery will be integrated in the mode of production, and spoilages and tolerance factors for end products produced by the machinery?" (ACEP)

Present Law: Foreign availability is defined as a good or technology available from foreign

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sources that can be obtained in sufficient quantity and is of sufficient quality so that U.S. export controls are rendered ineffective.

Pro: The change from "sufficient" to "comparable" clarifies the foreign availability assessment. Moreover, the listing of various factors involved in the foreign availability assessment ensures increased accuracy, thereby enhancing the national security control system.

Con: Foreign availability should be defined by regulation, not inflexibly by statute. The meaning and application of certain components of this definition are not clear.

Approve _____

Disapprove _____

UNDECIDED ✓

COMMERCE PREFERS
DETAIL IN
REGULATIONS
DOD FAVORS AS IS

B. COCOM (Section 5(i))

Issue 1: Should the United States unilaterally control items it submits for inclusion on the COCOM list pending a COCOM list decision? (DOD)

Present Law: There is no requirement that restrictions or controls be placed on goods or technology that the U.S. recommends to COCOM for multilateral export control.

Pro: Such control would demonstrate our seriousness about the proposed list item with our COCOM partners. This proposal could, arguably, improve our negotiating posture.

Con: This power already exists in a discretionary form under current law. Mandatory unilateral controls on U.S. items during the sometimes protracted COCOM review process would prejudice U.S. businesses. The COCOM process would also suffer because the current practice of submitting list proposals in an exploratory, tentative form could not continue.

Approve ✓

Disapprove _____

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PRESIDENT
ALREADY HAS
THIS POWER
BUT ADDITION
TO EAA WOULD
BE A PLUS IN
COCOM LIST
REVIEW
NEGOTIATION

Issue 2: Should the EAA require the President to attempt to formalize the COCOM organization, seek establishment of a military subcommittee, and provide additional funding for COCOM? (ACEP)

Present Law: COCOM is a purely voluntary organization not established by treaty or by formal international agreement. The current law does not address COCOM funding or provide for a military subcommittee.

Pro: COCOM's current informal, voluntary status has kept the organization from maintaining effective multilateral controls. Formalization of COCOM could lead to higher ranking representation, adequate funding and more effective controls.

Con: An attempt to formalize COCOM may force some members to be less cooperative or to withdraw because members would often not be in a position to agree to certain controls if those controls were to be the subject of formal governmental review. Moreover, a statutory mandate for COCOM formalization might be counterproductive to our efforts to seek increased formalization or to enhance COCOM's effectiveness under its current structure.

Approve _____

Disapprove _____ ✓

WILL USE A
MODIFIED DOD
LANGUAGE TO
"STRENGTHEN COCOM"

Issue 3: Should the EAA provide sanctions against COCOM members who violate COCOM agreements? (DOD)

Present Law: There are currently no sanction provisions in the EAA.

Pro: Such sanctions would make multilateral controls through COCOM more effective.

Con: This proposal would jeopardize continued participation in COCOM by certain member states. Any provision for sanctions should result from agreement among the COCOM members rather than by unilateral U.S. statutory mandate. This proposal would invite retaliation against the U.S.

Approve _____

Disapprove _____ ✓

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C. Militarily Critical Technology List (MCTL)
(Section 5(d))

Issue 1: Should the EAA be amended to provide:
"The establishment of adequate export controls for militarily critical technology and keystone equipment shall be accompanied by suitable reductions in the controls over the products of that technology and equipment?" (Business)

Present Law: No statutory distinctions currently exist between the export controls over militarily critical technology and keystone equipment and the products of that technology and equipment.

Pro: The need for control is on the underlying technology, not the resulting product. The burden of acquiring licenses would be reduced.

Con: Reverse engineering of the decontrolled and available products could jeopardize U.S. national security.

Approve _____

DEFER ✓
Disapprove _____

DOD + COMMERCE
GENERALLY
APPROVE,
BUT WILL
PROVIDE NEW
LANGUAGE.

Issue 2: Should the definition of the MCTL be expanded to include: "goods and technology (i) that would extend, complete, maintain or modernize process lines employed in the application of the militarily critical technology, (ii) the analysis of which would reveal or give insight into a United States military system and would thereby facilitate either the design and manufacture of that system or the development of counter-measures against that system, or (iii) which will contribute to strengthening Soviet military capabilities or enabling defense priority industries, including: microelectronics, computers, communications, shipbuilding, aerospace

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and aviation, including instrumentation, in the Soviet Union and the Warsaw Pact or other proscribed nations to produce items controlled for national security reasons to the detriment of the United States?" (DOD)

Present Law: The MCTL is not defined, though reference is made in the MCTL section to goods and technology that would significantly advance the military system of a country to which exports are controlled. No MCTL has ever been finalized.

Pro: Explicitly defining the MCTL would clarify its scope and would ensure a more accurate assessment of militarily critical technologies.

Con: An MCTL definition should not be included in the statute because more flexibility can be retained by defining it administratively by regulation. This definition is broader than necessary to adequately protect national security. Opening up this definition to Congressional debate runs the risk of an unfavorable ultimate result.

Approve _____ Disapprove ✓

D. Exports to Embassies (Amend Section 5(b))

Issue 1: Should a validated license and DOD review be required for proposed "exports" of any goods or technology on the CCL to proscribed country embassies in the United States and to all international organizations in the United States? (DOD)

Present Law: There are no provisions explicitly authorizing restrictions on domestic sales of goods or technology to embassies of proscribed countries located in the United States or to international organizations in the United States.

HANDLE BY
REGULATION
LIONEL NOTED
MCTL HAS
DEGENERATED
INTO A "SWAMP"
AND NEEDS
TO BE REVIEWED

Pro: Transfer of controlled items to these embassies and international organizations is a major loophole in the current export control system.

Con: This proposal would be virtually unenforceable. Retaliation against U.S. embassies abroad could be expected. The proposal would not alleviate the problem of covert operators, since those individuals would not apply for a license in the first instance.

Approve ☒

Disapprove ☐

UNDERSTAND
PROBLEM AS
ONE OF ENFORCE-
MENT -
TRY FOR BETTER
LANGUAGE TO
COVER COMMUNIS-
T OWNED FIRMS -
CANADA - (NO
EXPORT LICENSES
REQUIRED)

E. Multilateral vs. Unilateral

Issue 1: Should a specified notice and comment period for Congress and the private sector be required prior to the imposition of unilateral controls?
(Business)

Present Law: The Secretary of Commerce is not required to consult with the Congress or the private sector before unilaterally imposing export controls for national security purposes.

Pro: The proposal gives the private sector the opportunity to inform the Administration of the economic effect of, and alternatives to, contemplated controls. Congress would also be assured of the opportunity to express its concerns prior to the imposition of controls.

Con: The need for secrecy in the national security area makes such a provision impractical. The provision also reduces Presidential flexibility and authority.

Approve ☐

Disapprove ☒

F. DOD Role (See Organizational Change Section)

G. Findings and Policy Declarations

Issue 1: Should section 2(3) be amended to read:
"A high priority should be placed on exports [ACEP: export policy], consistent with the economic, security, and foreign policy objectives of the United States?"
(State/ACEP)

Present Law: Current Section 2(3) calls for high priority on exports but makes no reference to the national security interests of the United States.

Pro: This change would demonstrate the Administration's heightened concern regarding the adverse impact of security-sensitive exports on our national security, and would state a better balance between the economic and security objectives of the Act.

Con: This proposal is redundant with other parts of the Act.

Approve ✓ Disapprove _____

Issue 2: Should section 2(5) be deleted and language similar to the following substituted: "The transfer of critical commodities and technical data has made a significant contribution to the military potential of other countries which has been detrimental to the security of the United States, its allies, and other friendly nations, and has necessitated increases in the defense budgets of these nations?"
(State)

Present Law: Current section 2(5) provides: "Exports of goods or technology without regard to whether they make a significant contribution to the military potential of individual countries or combinations of countries may adversely affect the national security of the United States."

Pro: This change would demonstrate the Administration's heightened concern regarding the adverse impact of security-sensitive exports on our national security, and would

state a better balance between the economic and security objectives of the Act.

Con: Arguably there may not be empirical evidence to support this finding.

Approve ✓ Disapprove _____

Issue 3: Should a finding and policy declaration be proposed asserting that export controls should be used to seek to prevent the U.S. and its allies from excessive energy and other critical resource dependence on potential adversaries? (ACEP)

Present Law: There are no findings or policy declarations that relate to the desirability of avoiding becoming dependent on others for critical resources, in general, or for energy resources, in particular.

Pro: This finding and policy declaration would reflect U.S. policy, and would ensure that the national security significance of resource dependence is recognized in the Export Administration Act. The Act is the most appropriate statute for such recognition.

Con: The provision is unnecessary because export controls on energy-related items are already within the policy purview of the Act. The provision singles out one of many possible reasons for the imposition of export controls. Following so soon after the pipeline sanctions, this provision would unnecessarily alienate members of Congress, the business community and our allies.

Approve _____ Disapprove _____

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H. Negotiations with Neutral and Non-aligned Countries
(Amend Sections 3(9) and 5(f)(4))

Issue 1: Should the President be authorized to

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negotiate (and encouraged to do so through a policy declaration) with neutral and non-aligned countries with whom we have common ~~strategic~~ interests to restrict re-export of U.S. goods and technology? (DOD)

Present Law: The Act states that is the policy of the U.S. to cooperate with other countries with whom we have defense treaty commitments to restrict exports contributing to the military potential of another country to the detriment of the United States. The Secretary of State is responsible for conducting negotiations to carry out this policy. Also, whenever the President exercises his override of foreign availability for national security reasons, he is required to negotiate to eliminate this foreign availability. Under the Case Act, all agreements must be reported to the Congress, although classified agreements may be sent to selected committees only. These committees may not distribute these agreements without Presidential approval.

Pro: Providing this authority to the President would reflect the increased emphasis that this Administration has given to guarding against diversion of U.S. technology and goods through these countries. The provision would highlight the need for State Department attention in this area.

Con: Neutral and non-aligned countries might be reluctant to conclude cooperative agreements with the U.S. if these agreements were characterized as evidence that they had common strategic interests with the United States. Moreover, if these agreements were transmitted to Congress, there would be a high risk that their content would become public.

Approve ✓ Disapprove

I. Indexing Provision (Section 5(g))

Issue 1: Should indexing be eliminated from the national security section of the EAA? (DOD)

Present Law: The statute provides that the Secretary of Commerce may, when appropriate, provide by regulation for annual increases in the performance levels of goods or technology subject to licensing requirements. Any good or technology no longer meeting the performance requirement is automatically removed from national security control unless any agency objects and the Secretary thereafter determines that the item should remain under control.

Pro: The indexing provision is unnecessary because the EAA already calls for periodic list review. Pre-set standards for decontrolling items cannot currently anticipate the rapidly changing development of technology.

Con: Because no items should be unnecessarily controlled, the performance level of controlled items should be reviewed frequently. The indexing provision is necessary because review of multilaterally controlled items otherwise occurs only once every three years. The indexing provision ensures timely decontrol.

Approve



Disapprove

APPROVE
BUT
INDEXING
SHOULD
BE AGAINST
SOVIET
STATE OF
TECHNOLOGY
NOT US

II. Foreign Policy ControlsA. Extraterritoriality (Section 6(a))

Issue 1: Should the extraterritorial application of controls be restricted by:

(A) eliminating them altogether (Business);

Approve

Disapprove



(B) eliminating such controls except in the case of a declared national emergency (USTR);

Approve

Disapprove



(C) inserting a finding which states "when imposing new foreign policy controls, impact on pre-existing contracts and on business activities in allied or other friendly countries should be minimized to the extent consistent with the underlying purpose of the controls". (State)

Approve ✓

Disapprove _____

Present Law: The statute does not address who is included in the operative phrase "persons subject to the jurisdiction of the United States"; by regulation, the Commerce Department has, on occasion, defined this term to include foreign subsidiaries and licensees of U.S. corporations.

Pro: The current extraterritorial reach of these controls has caused major international relations problems, particularly with our allies. Arguably, extraterritoriality may violate international law and interfere with principles of sovereignty.

Con: Extraterritorial application of the statute is necessary to implement foreign policy controls effectively.

B. Sanctity of Contract and Licenses (Non-retroactivity)

Issue 1: Should contracts and export licenses be protected from later imposition of controls for at least a specified period of time by:

(A) totally insulating such contracts and licenses? (Business);

Approve _____

Disapprove _____

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(B) insulating such contracts and licenses except in the case of a declared national emergency? (USTR);

Approve _____ Disapprove ✓

(C) inserting a policy declaration that "when imposing new foreign policy controls, impact on pre-existing contracts and on business activities in allied or other friendly countries should be minimized to the extent consistent with the underlying purpose of the controls?" (State)

Approve ✓ _____ Disapprove _____

Present Law: The President may invoke export controls that affect existing export controls and outstanding export licenses. Note, however, that the President recently signed a law that provides contract sanctity for agricultural exports for a period of 270 days after imposition of the controls.

Pro: The imposition of export controls on pre-existing contracts and licenses makes U.S. exporters unreliable suppliers and forces them to incur unexpected economic losses.

Con: The President's foreign policy powers would be significantly impaired by such provisions; less so, by the proposed policy declaration.

C. Insurance or Compensation

Issue 1: Should insurance or compensation be provided for business losses caused by the imposition of foreign policy controls? (USTR/Business)

Present Law: There are no provisions to insure or compensate businesses that incur economic loss caused by the imposition of foreign policy controls. (Compensation is provided for agricultural products under separate statute.)

Pro: The government should reimburse businesses for losses caused by its actions.

Con: This proposal might be very costly. Also, the extent of injury in many cases would be difficult to determine. Would create a potentially undesirable precedent with regard to compensating citizens for losses incurred by the exercise of other foreign policy authorities. Without regard to the proposed compensation, U.S. suppliers would still be deemed unreliable.

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Approve _____ Disapprove _____

D. Restrictions on Imposition of Controls

Issue 1: Should the President's authority to impose foreign policy controls be limited by:

(A) allowing foreign policy controls only under the International Economic Emergency Powers Act (IEEPA) standard which requires a "national emergency" declaration by the President? (Business);

Approve _____ Disapprove ☒

(B) requiring the President to meet (rather than just consider) the current six criteria for imposition of controls? (Business);

Approve _____ Disapprove ☒

(C) strengthening the requirement to complete an economic impact analysis before the imposition of any control? (Business);

Approve _____ Disapprove ☒

(D) requiring Congressional approval before controls may be imposed? (Business);

Approve _____ Disapprove ☒

(E) granting Congress the right to veto any control? (Business)

Approve _____ Disapprove ✓ _____

(F) requiring a mandatory Congressional and private sector notice and consultation period before a control becomes effective? (USTR/Business).

Approve _____ Disapprove ✓ _____

Present Law: The President may impose export controls to the extent necessary to further significantly the foreign policy of the United States or to fulfill its international obligations. Before imposing foreign policy export controls, the President must first consider six statutory criteria and later report to Congress on his conclusions. The President is not bound to make a decision that conforms to the result of this consideration. One of the six criteria that the President must consider is the effect of the controls on the competitive position of the U.S. in the international economy, on the reputation of the U.S. as a reliable supplier, and on individual U.S. companies and their employees and communities. Also, before imposing foreign policy controls, the Secretary of Commerce shall consult with affected industries as he considers appropriate and also consult "in every possible instance" with the Congress. Congressional approval is not required before foreign policy controls may be instituted. Congress does not have the authority to veto any non-agricultural export control, although the Congress can pass a new law that would have the effect of overturning an export control.

Pro: All of these proposals, in varying degrees, impose necessary safeguards against misuse of foreign policy controls that can dramatically affect U.S. businesses. The current virtually unrestricted use of foreign policy controls has damaged U.S. national and business interests both domestically and internationally. These controls should only

be used in limited circumstances following consideration of Congressional and private sector views.

Con: The President's power to impose foreign policy controls would be diminished by all of these proposals. Current law already requires the President to consider and report to Congress on his findings for each of the six criteria listed in the statute. These criteria already require him to consider the economic impact of proposed controls as well as the availability of goods from foreign sources. The President should retain the power, in situations short of a "national emergency", to impose foreign policy controls. The time delay caused by a mandatory notice and comment period would impair the effectiveness of any controls and conceivably would allow businesses to undercut the controls by completing contracts during this interim period. In addition, the marshaling of political forces against the President during this time period would make imposition of controls more difficult. The Congressional veto proposal may well be unconstitutional.

E. Duration

Issue 1: Should foreign policy controls require renewal in a period shorter than one year? (Business)

Present Law: Foreign policy controls expire one year after imposition, unless extended by the President for a period of not more than one year.

Pro: Because of the impact of foreign policy controls and the fluid nature of world conditions, the controls should be reassessed more often than once a year.

Con: This proposal weakens the impact of the control and diminishes the President's foreign policy authority by requiring him to report to Congress more often. Export controls can

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currently be modified or removed in a shorter period if circumstances warrant.

Approve _____ Disapprove ✓

F. Import Controls

Issue 1: Should import controls be imposed on a country whenever export controls are imposed on that country, subject to such exceptions as the President may prescribe? (Heinz)

Present Law: There are no provisions which mandate imposition of import controls whenever export controls are imposed.

Pro: If U.S. exporters are required to incur economic loss, than the businesses in the affected countries should also share the economic burden of U.S. foreign policy controls. The proposal gives the President an additional tool for implementing U.S. foreign policy.

Con: Political pressure may be brought to bear upon the President to impose import controls or take stronger measures than he feels desirable. Serious foreign relations problems would likely ensue from this proposal.

Approve _____ Disapprove _____

G. Multilateral vs. Unilateral

Issue 1: Should all unilateral controls be eliminated? (Business)

Present Law: The President has the authority to impose foreign policy controls without regard to whether these controls are adopted by any other government.

Pro: Unilateral controls are ineffective and U.S. businesses should not be required to incur economic losses from such controls.

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COMPANIES
NOT
COUNTRY

Con: U.S. foreign policy should not be entirely dependent on the foreign policy objectives of other countries.

Approve _____

Disapprove ✓

III. Short Supply Controls

A. Moakley Amendment (Section 7(e))

Issue 1: Should this provision be deleted which requires a license authorizing the export of refined petroleum products? (ACEP)

Present Law: The Moakley Amendment requires that no refined petroleum product be exported except pursuant to a license and following a 30-day notice to Congress of intent to issue such license.

Pro: The provision is no longer necessary because refined petroleum products are not in short supply. Deleting this provision would allow U.S. refiners to compete more effectively in the world market. Should petroleum products once again become in short supply, the Moakley Amendment is not needed to reimpose export controls.

Con: The present world oil situation could suddenly change, and deletion of the Moakley Amendment could then jeopardize domestic U.S. supply of refined petroleum products. The Northeast region of the country would strenuously oppose this provision.

Approve ✓

Disapprove _____

B. Alaskan Crude Oil Provision

Issue 1: Should the prohibition on exporting Alaskan crude oil be deleted or modified, thus permitting exports of Alaskan crude oil to Japan?

Present Law: The provisions relating to crude oil effectively prohibit the export of Alaskan-produced crude oil.

Pro: The U.S. oil industry and Alaska would prosper from exporting crude to Japan; U.S. national security interests could be served by shifting Japanese energy dependence away from the Soviet Union and to the United States. The proposal would not result in domestic shortfalls because of abundance of worldwide and domestic crude oil supply.

Con: No position should be taken on this issue now because it is currently under study in the International Energy Security Group (IESG) and the SIG-IEP. Deletion of this provision would harm west coast refiners, shippers, and maritime employees.

Approve ✓ Disapprove

IV. Organizational Changes

A. DOD Review (Section 10(g))

Issue 1: Should DOD review be expanded to include all goods or technology controlled for national security purposes to any destination (not just proscribed countries)? (DOD)

Present Law: The Secretary of Defense is currently authorized to review any proposed export to any proscribed country (i.e., not free world).

Pro: DOD review as well as DOC review is necessary to insure adequate scrutiny of proposed security-sensitive exports.

Con: The DOD Review would simply duplicate the DOC review and would lengthen the licensing process. Certain key cases requested by DOD are referred to it by DOC for comment. Desired changes in this area are

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better addressed administratively by MOU or regulations rather than by statute.

Approve _____ Disapprove ✓

Issue 2: Should DOD be authorized to review all applications for distribution licenses? (DOD)

Present Law: The statute does not expressly grant the Secretary of Defense the authority to review applications for distribution licenses. (Distribution licenses are not used for proscribed countries.)

Pro: DOD review is necessary to assess potential abuse of distribution licenses which might lead to diversion of sensitive items to proscribed countries.

Con: DOD review would simply duplicate the DOC review and would lengthen the licensing process. Desired changes in this area are better addressed administratively by MOU or regulations rather than by statute. Administrative changes are, in fact, under review now.

Approve _____ Disapprove ✓

Issue 3: Should DOD be given the right to veto export of any goods or technology if DOD determines "that the export of any goods or technology will contribute to strengthening Soviet military capabilities or enable defense priority industries in the Soviet Union and the Warsaw Pact to produce items controlled for national security reasons to the detriment of the United States?" (DOD)

Present Law: Whenever the Secretary of Defense determines that exporting an item would significantly contribute to the military potential of another country and would create a risk to our national security, he may recommend to the President that he disapprove the export license. If the President

NOT NEEDED
IN EAA
COMMITTEE AND
DOD TO
WORKOUT
A MEMORANDUM
OF UNDERSTANDING

COMMITTEE &
DOD TO TRY
FOR AN MOU
BEFORE
STATUTORY
FIX

overrules the Secretary of Defense, he must so report to the Congress.

Pro: The proposed DOD review and veto power is necessary to protect fully the national security interests of the United States.

Con: The President should not be deprived of his current right to be the ultimate decisionmaker with regard to export control matters. This provision is also too broad and would give DOD veto power over exports to all countries and not just review power over exports to proscribed country destinations. The proposal would delay the licensing process.

Approve _____ Disapprove ✓

B. Customs Role

Issue 1: Should all enforcement functions be transferred to Customs? (Nunn and Heinz)

Present Law: Enforcement powers are vested in the head of any department or agency exercising any function under the Act. Accordingly, the Secretary of Commerce enforces the EAA, although he has, by regulations, authorized the Customs Service to assist with this enforcement.

Pro: Customs has the expertise, manpower and budget to enforce more effectively than Commerce the export control laws.

Con: Enforcement functions should remain in Commerce because enforcement is more effective when combined in the same agency with the licensing functions. The Office of Export Enforcement (Commerce), unlike the Customs Service, has a single mission enforcement role. The Commerce Department has recently devoted substantial resources to improving its Office of Export Enforcement.

Approve _____ Disapprove _____

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C. Office of Strategic Trade

Issue 1: Should a new Office of Strategic Trade (OST) be created? (This would be an independent executive agency whose director would be a member of the N.C.S. The OST would be responsible for administering and enforcing export control laws under the EAA and the Arms Export Control Act.) (Garn)

Present Law: Export trade controls that are the subject of the Export Administration Act are generally vested in the Secretary of Commerce. The authority to control trade in munitions is the responsibility of the Department of State.

Pro: The OST would not be subject to the pro-export bias of the Department of Commerce. Creating a separate agency, and placing its director on the NSC, reflects the importance of export controls to the Administration. Because of its visibility, the OST would be able to attract better qualified personnel.

Con: This new bureaucracy is unnecessary and would be costly. The current interagency review process works well and provides the necessary balance among the competing purposes of the EAA.

Approve _____

Disapprove ✓

V. MiscellaneousA. Judicial Review

Issue 1: Should the EAA be amended to provide for judicial review of licensing and control decisions. (Business)

Present Law: Persons claiming harm from licensing and control actions taken under the Act may not resort to the courts to obtain judicial review of these actions.

Pro: There is currently no impartial review of actions taken under the Act. Judicial review is necessary to ensure that the provisions of the Act are fully and properly administered.

Con: Judicial review would encounter severe business confidentiality and classification problems. The licensing process would be slowed considerably due to litigation involvement of licensing personnel. The provision would not be very effective because courts are reluctant to question foreign policy and national security decisions of the Executive. Moreover, it may not be desirable to have the courts reviewing Executive decisions in these areas.

Approve _____

Disapprove ✓

B. Licensing

Issue 1: Should the EAA eliminate the license requirement for shipments of non-MCTL goods and technology from the U.S. to COCOM countries, Australia and New Zealand? (Business)

Present Law: These named countries receive no special statutory treatment except for exemption from provisions relating to export of crime control and detection instruments.

Pro: This provision would eliminate delays and loss of profits caused by West-West licensing. The damage to U.S. competitiveness resulting from U.S. licensing of non-MCTL "West-West" trade, outweighs the minimal value to U.S. national security of such licensing. To detect diversion, less stringent certification procedures could be devised.

Con: This provision would eliminate the paper trail necessary to detect diversion. The proposed change can be made administratively by regulation.

Approve _____

Disapprove ✓

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Issue 2: Should a new special license be created for shipments of goods and technology intra-company (Parent-sub, sub-sub)? (Business)

Present Law: The Secretary currently has the authority to require (and so establish) any special license that will assist in the effective implementation of the Act. No special license now exists for intra-company exports.

Pro: Internal company transfers should be subject to minimal regulations. A new less restrictive license would still provide a paper trail of items transferred, but would minimize delays and loss of profits caused by the present system.

Con: This proposal, if desirable, can be done administratively under the current statute. Foreign subsidiaries often operate independently of their parent companies, and may be located in countries whose foreign policy objectives are different from those of the U.S.

Approve _____

Disapprove ✓

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C. Anti Boycott

D. Enforcement and Violations Sections

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